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No. 87-5677

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

WARREN LEE HARRIS
Petitioner,

v.

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private,

nonprofit, national membership organization headquartered in Washington, D.C., whose purpose is to insure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners. Counsel for both Mr. Harris and the State of Illinois have consented to the filing of an amicus curiae brief by NLADA.

NLADA is vitally interested in assuring that indigent prisoners throughout the country are guaranteed equal access to federal review of their constitutional claims which have been held defaulted on state procedural grounds. In this case, the Court will decide whether an indigent prisoner can obtain federal review of his claim of ineffective assistance of trial counsel, where the state court opinion was ambiguous in deciding the issue against him both on the basis of a procedural default as well as on the merits. NLADA respectfully requests this Court to consider its brief on this significant public question.

STATEMENT OF THE CASE

Mr. Harris was convicted of murder in 1977 and was sentenced to 50 - 100 years' imprisonment. His conviction was

affirmed on direct appeal, which raised only the issue of reasonable doubt (People v. Harris, 71 Ill.App.3d 1113, 392 N.E.2d 1386 (1979))[1]

Ineffective assistance of trial counsel was raised in the state court for the first time in Mr. Harris's post-conviction petition. The trial judge granted the State's motion to dismiss this petition on the basis of res judicata. The state appellate court affirmed the judge's ruling in a decision which suggested at one point that the issue of ineffective assistance of counsel had been waived, but then also indicated at another point that Mr. Harris had not been denied his sixth

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1 Joint Appendix references were not available when this brief was written.

amendment rights. (Unpublished Order of the Illinois Appellate Court: People v. Harris, No. 81-871, February 22, 1983)

When Mr. Harris persevered with his ineffective assistance of counsel claim by seeking habeas review in the federal court, the district court determined that the state appellate court had not "concluded" that the federal claim had been waived. The district court further ruled that the state court had "ignored" any waiver by appellate counsel's failure on direct appeal to raise the ineffectiveness claim. (Harris v. Reed, 608 F.Supp. 1369 (N.D. Ill. 1985)) After convening a three-day evidentiary hearing, the district court held against Mr. Harris on the merits and denied his request for a writ. (Unpublished Memorandum Opinion and Order, May 30, 1986)

A majority of the court of appeals disagreed with the district court's determination concerning the procedural default. The majority allowed that the state court order in question was ambiguous since there had been neither an explicit finding of waiver nor an express intention to ignore waiver, and because the state court had addressed the merits of some of Mr. Harris's claims of ineffective assistance of counsel after the court had clearly implied that these claims had been waived. Ultimately the court of appeals held that the state court had "intended" to find that Mr. Harris had waived all claims of ineffective assistance of trial counsel, except those that could only have been supported from facts not of record (i.e., the "alibi witnesses"). (Harris v. Reed, 822 F.2d 684, 685, 687 (7th Cir. 1987))

Finding that the state appellate court had ruled in the alternative -- both on the procedural ground as well as on the merits -- the court of appeals declined to review the federal issues. (Ibid.)

In a concurring opinion, one judge of the court of appeals thought that the ineffective assistance of counsel claim should not be treated as waived, since the state court had made no express determination that it had been waived and because the state court had in fact considered the issue on the merits. This judge preferred to "invoke a presumption that waiver not clearly found has been condoned." (Harris v. Reed, 822 F.2d at 687, Cudahy, C.J., concurring)

This court granted Mr. Harris's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The rule of Michigan v. Long, 463 U.S. 1032 (1983), that in order to preclude federal review on direct appeal a state court must have made a "plain statement" that an adequate and independent state substantive ground compelled its decision, should be applied to state rulings on procedural grounds in federal habeas proceedings. A "plain statement" rule is needed to insure that indigent prisoners have a chance to obtain federal review of their constitutional issues when state courts have been ambiguous in rendering their decisions. Fairness to the indigent prisoner dictates that he understand clearly the basis of the state court's denial of his federal claims.

The efficient functioning of the criminal justice system would also be best served by a "plain statement" rule.

When federal courts engage in the exercise of trying to divine the intent of state courts which are unclear in their reasons for denying relief, yet another level of litigation is added to the process. State courts, which can rightfully be offended by federal courts trying to ascertain their meaning, can control the extent of federal collateral review by merely making a "plain statement" of their holdings on state procedural grounds. The process now required in which federal courts must make a threshold determination of the state court's intent to allow or preclude or limit federal review would be less confusing and less time-consuming if a "plain statement" rule were adopted by this Court.

Finally, for administrative purposes as well as purposes of the equal

application of justice, indigent prisoners throughout the United States are entitled to a consistent and workable rule. Because of the conflicts among the circuits, and in some cases within the same circuit, indigent prisoners have no predictable way of knowing which of their claims may have survived for federal review. These concerns are especially paramount to death-row clients, whose very existence may depend upon federal review of their claims.

Because the state court decision denying Mr. Harris's claim of ineffective assistance of trial counsel fails to make a "plain statement" that it was decided on the basis of a procedural default, this Court should determine that this issue survived for federal review. This Court should then reverse the decision of the court of appeals and order that court

to review the district court's determination on the merits.

ARGUMENT

THE "PLAIN STATEMENT" RULE OF MICHIGAN V. LONG IS THE ONE SIMPLE, WORKABLE, UNIFORM AND FAIR STANDARD THAT SHOULD BE APPLIED TO STATE COURT HOLDINGS WHICH ARE AMBIGUOUS IN REGARD TO BEING BASED UPON PROCEDURAL DEFAULT OR UPON THE MERITS.

Since Wainwright v. Sykes, 433 U.S. 72 (1977), this Court has held that a state court decision resting upon an adequate and independent state procedural ground will bar federal habeas review absent a showing of cause and prejudice. Further, this Court has added that if a state court has not articulated that review of federal claims is barred by a state procedural rule, then a federal court "implies no disrespect for the State" by reviewing those claims. Ulster County Court v. Allen, 442 U.S. 140, 154 (1979).

This line of cases was refined in Michigan v. Long, 463 U.S. 1032 (1983), where this Court announced a requirement of a "plain statement" that the state court decision rested upon adequate and independent state grounds, and that any discussion on the merits buttressed by federal law was offered only for guidance and did not compel the result reached. In the absence of such a "plain statement," federal habeas review of constitutional claims would lie. Although Michigan v. Long involved a substantive state ground, this Court subsequently applied the same reasoning in regard to a state's procedural bar as an independent basis for disposing of the case. Caldwell v. Mississippi, 472 U.S. 320 (1985).

There is no question that in Mr. Harris's case, the state court decision is ambiguous; the four federal judges who

have viewed it have arrived at two different results. In light of such ambiguity, and the serious nature of the stakes involved to indigent prisoners, such ambiguity should not be resolved in favor of procedural default to preclude federal review on the merits. The last chance for federal review for an indigent prisoner, especially in a capital case, should not hinge upon a state court's ambiguity any more than it should upon how a federal court might construe that ambiguity.

Mr. Harris thought that he had been denied the effective assistance of trial counsel. His appellate counsel did not raise trial counsel's ineffectiveness on direct appeal, thereby foreclosing review of this issue under Illinois procedural law in regard to facts which were of record on direct appeal. When Mr. Harris

attempted to obtain state collateral review on this issue, he was denied this relief for a variety of reasons. He was informed that he failed to preserve the issue and he was also informed that his issue did not have any merit.

Mr. Harris next sought redress from a federal court, petitioning pro se that his sixth amendment right had been violated. The district court resolved the state court ambiguity in favor of Mr. Harris, deciding that any procedural default had been ignored when the state court ruled on the merits. Hence, the district court applied reasoning consistent with Michigan v. Long and accorded Mr. Harris review of his federal issue.

Mr. Harris was sentenced to an indeterminate prison term. However, the stakes are much higher for death-row indigent prisoners, whose very lives

depend upon the wording of state court decisions. If a state court has found a procedural default, then the prisoner knows he must argue "cause and prejudice" to obtain federal review under Sykes. If the state court has ruled on the merits, then the prisoner knows he must argue the merits of the federal claim to obtain relief. However, if the state court has been ambiguous in its holding, then the prisoner does not know how to argue. Requiring an indigent prisoner, especially in a capital case, to bear the burden of a state court's ambiguity on an issue as critical as federal review of constitutional claims works a grave injustice.

A second consideration for applying Michigan v. Long to federal habeas cases is conserving costs to the criminal justice system. Any argument that a Sykes analysis can be handled efficiently

without the use of the standard in Michigan v. Long is belied by the very facts in this case. The district court made a detailed analysis to ascertain what the state court had, and had not, deemed waived -- in addition to determining whether that waiver had been forgiven. It was only after these procedural ambiguities were resolved that the district court ordered an evidentiary hearing and appointed counsel to assist Mr. Harris. Then, after three days of hearing evidence on all aspects of the ineffective assistance of counsel claim, the district court found against Mr. Harris on the merits.

This bifurcated process began anew when Mr. Harris sought review by the court of appeals. All three judges studied and deliberated the state court opinion and were frustrated in their

attempt to discern its meaning from the plain language of the decision itself. The fact that one judge on the court of appeals viewed the state court decision in the same manner as the district court had, while the majority came to a different conclusion, is proof that the decision fell short of a "plain statement" in regard to procedural default. The state court owes not just the indigent prisoner, but also the judiciary, a clear, honest statement of the status of collateral review so that federal courts can act or decline to act efficiently. Applying the standard announced in Michigan v. Long, as the instant case so clearly illustrates, would enable the federal judiciary to handle its responsibilities more expeditiously and more efficiently.

Of course, if the interest of streamlining the federal case load were the only concern, an ideal ruling from this Court would be to require every state court to make a ruling on federal issues so that federal review would always be possible. Then there would be no analysis needed under Sykes concerning the effect of the procedural default, or whether "cause and prejudice" had been shown, or whether in fact a miscarriage of justice had occurred. However, NLADA recognizes that under long-standing and appropriate concerns of comity such a decision requiring state courts always to rule on federal issues would be an anathema to the states, regardless of how beneficial it might be to indigent prisoners desirous of obtaining appellate review of their federal issues.

However, it is not necessary to make such a sweeping ruling to promote the interests of finality, judicial economy and fairness to indigent prisoners. The rule of Michigan v. Long would accomplish such a purpose. State courts could still control the content of their opinions, as well as the initial determination of federal collateral review. State courts could continue to decide a case on the basis of an adequate and independent state procedural ground, as long as the state court opinion clearly indicated its holding. Such a slight intrusion into the state judicial system should not offend comity, certainly given the alternative of forcing federal courts to "divine the meaning" of ambiguous state decisions such as the one before this Court.

These concerns are well expressed in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). In this case, the court of appeals denied the writ of habeas corpus sought by the petitioner, but remanded the case for a resentencing. Although the court of appeals has ordered a rehearing in banc and vacated the judgment pending this rehearing (828 F.2d 1498 (11th Cir. 1987)), a discussion of the Michigan v. Long rule in a specially concurring opinion by Circuit Judge Clark is still instructive:

> The Long "plain statement" rule is applicable in this case. ... First of all, such a bright-line rule fosters the comity and federalism concerns of Sykes by providing a consistent and predictable approach. Such a rule would not be unduly burdensome to the state courts, and those courts would retain their ability to enforce their procedural rules and to preclude federal review in appropriate cases. ...

* * *

> It would be an affront to the principles of comity and federalism to presume that the Florida Supreme Court was relying on procedural default absent express language in that court's opinion to that effect.
>
> 817 F.2d at 1487-88 (Clark, C.J., specially concurring)

Thus in evaluating the intrusion by federal courts in requiring "plain statements" about procedural defaults from state courts, this judge on the court of appeals gave greater weight to the interests of defendants and the preservation of federal claims. The interests of indigent prisoners and the federal judiciary are similarly better served by removing the initial level of litigation over the meaning of an ambiguous state court holding.

Finally, as a national organization, NLADA is very concerned about the

conflict in the standards applied by the various circuit courts of appeal, as well as with apparent conflicts within the same circuit. The need for one workable, fair and cost-effective standard is of paramount concern. The discussion by the court of appeals in Phillips v. Smith, 717 F.2d 44 (2d Dist. 1983), cert. denied, 465 U.S. 1027 (1984), analyzes the many different approaches.

The court of appeals in Phillips discusses the "exclusive reliance" standard applied in the Fifth, Ninth and Eleventh Circuits, holding that Sykes does not bar federal habeas review of federal constitutional claims unless the state court "exclusively relied" on the defendant's procedural defaults. Phillips also discusses the "alternative holding" perspective of the Third and Seventh Circuits, which precludes federal

review because of a state procedural default whenever the state court relied in any way on an adequate and independent state procedural ground, notwithstanding that in the alternative the court may have ruled against the petitioner on the merits. Phillips further discusses the "more flexible" standards of the Sixth and Eighth Circuits, applying the procedural default rule in Sykes only if the state court relied "primarily" on the procedural ground; this approach necessitates an analysis of the intention of the state court. In applying the view of the "alternative holding" circuits, the court in Phillips was guided by Michigan v. Long to determine whether the state court had made a "plain statement" of its intention to rule against the defendant because of the procedural default. 717 F.2d at 50 and n.2.

The Court of Appeals for the Seventh Circuit, whose decision is now before this Court, has not always been uniform in deciding when procedural default will prevent an ineffective assistance of counsel claim from surviving for federal collateral review. See, e.g., United States ex rel. Barnard v. Lane, 819 F.2d 798 (7th Cir. 1987), in which the court of appeals affirmed the district court's grant of a writ of habeas corpus. A unanimous court held that ineffective assistance of appellate counsel was good "cause" under Sykes for the petitioner's failure to present his ineffective assistance of trial counsel claim on direct appeal in the Illinois court. The court of appeals also held that the defendant had been prejudiced by that procedural default and that he had not

waived habeas review of that claim. 819 F.2d at 801, 805.

Mr. Harris would be hard-pressed to reconcile the court of appeal's ruling in favor of Mr. Barnard on the issue of procedural default of appellate counsel with his own treatment on the same issue. The apparent inequities that result from a lack of one workable rule such as in Michigan v. Long are striking in Mr. Harris's case. Such inequities will continue to result if federal courts continue to second-guess ambiguous state opinions or if the federal courts make a presumption in favor of procedural default which the state court may never have intended. The claims of indigent prisoners, and the lives of indigent prisoners in capital cases, should not depend on the fortuitous circumstance of

where in the federal judicial system these prisoners reside.

Currently, there are approximately 570,519 prisoners in this country,[2] of which over 90 percent are indigent[3] and 2,021 are on death-row.[4] At the initial level when seeking a writ of habeas corpus, a majority have to proceed pro se or with volunteer counsel and "earn the right" to obtain the assistance of counsel.[5] Without any clear indication

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2 U.S. Department of Justice, Bureau of Justice Statistics, as of June 30, 1987, reported in a press release issued September 6, 1987.

3 Alvin J. Bronstein, Executive Director, National Prison Project of ACLU Foundation, Inc.

4 "Death Row, U.S.A.," March 1, 1988, newsletter published by the NAACP Legal Defense and Educational Fund, Inc.

5 Mary Broderick, Director of the Defender Division, NLADA.

from this Court of a uniform standard to be applied, such as that in Michigan v. Long, these persons may well lose the last -- or in some cases the only -- federal review of their federal claims. As a national organization, NLADA is concerned that the lack of a uniform standard will lead to disparate and unfair results.

CONCLUSION

The "plain- statement" rule of Michigan v. Long which applied on direct appeal in regard to issues of state substantive law should be applied to federal habeas review concerning matters of state procedural default. Such a ruling would be workable, fair and cost-effective, as well as not offensive to principles of comity or to the Court's policy in Wainwright v. Sykes. Such a policy would simplify habeas petitions while not undermining federalism. Most important, ambiguities precluding review of federal rights would be resolved in favor of the indigent prisoner who may have reached his last line of review.

For these reasons, this Court should reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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QUESTION PRESENTED

When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, should that ambiguity be resolved in favor of affording habeas review of the constitutional claim.

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INTEREST OF AMACUS CURIAE

The State of Florida, through its Attorney General, respectfully offers this brief in support of respondents Marion Reed, Warden and Neil F. Hartigan, Attorney General of the State of Illinois. Amicus will be affected by the outcome of the decision in this case since the exact issue has been and will continue to appear in habeas corpus petitions filed in federal court. Amicus believes that resolution of the issue, as suggested, will greatly lessen the load of federal courts which are, unnecessarily, considering issues that have been procedurally defaulted.

SUMMARY OF THE ARGUMENT

Wainwright v. Sykes, infra, is based on the premise that the judgment of conviction rests, not on the federal question, but on the procedural default. Once a judgment of conviction is finalized through completion of the appellate process, that judgment continues to rest on an independent ground throughout any state collateral attacks until such time as the state courts, through unambiguous language, in the collateral proceeding, say the judgment no longer rests on the procedural default but on the then decided federal question. Until such occurs it cannot be said the state court "waives the waiver." Any less requirement would do violence not only to finality, but to comity and strain relationships between state and federal courts.

ARGUMENT

For purposes of argument Amicus would re-phrase the question as follows:

> May a federal court consider a procedurally defaulted issue that had not been raised on direct appeal on the grounds that ambiguous langauge by the state appellate court in denying post conviction relief constituted a ruling on the merits where the post conviction proceeding was not the proper forum to raise the issue and the merits were not discussed by the state appellate court.

This Court has held that even where a federal question has been procedurally defaulted because it was not raised at the state trial level, if, on direct appeal of the judgment of conviction, the state appellate court ignores the default and rules on the merits of the federal question, a federal court, setting in habeas, may also consider the merits of the question. County Court of Ulter County, New York v. Allen, 442 U.S. 140

(1979). Mullaney v. Wilbur, 421 U.S. 684, footnote 7 (1975).

In the instant case, however, as is occuring in many habeas cases, the federal question was defaulted not only at the trial level, but at the appellate level, since it was neither raised nor considered on direct appeal of the judgment of conviction. It was presented for the first time in a motion for post conviction relief. Harris v. Reed, 822 F.2d 684 (7th Cir. 1987). Failure to raise an issue at the trial level, where required by state law, constitutes a procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977). Even if the federal question is raised at the trial level, if it is not thereafter raised on direct appeal from the judgment of conviction it will constitute a procedural default. Murray v. Carrier, 477 U.S. 478 (1986), Smith v. Murray, 477 U.S. 527 (1986).

In the instant case, the federal question was one which, under state law could have been raised on direct appeal and failure to do so " . . . waives the issue for post-convcition review."[1] Harris v. Reed, at 686. Similarly in Florida, as in many states, federal questions, which could have or should have been raised at the trial level and on direct appeal, are deemed waived and may not be raised by way of motion for post conviction relief. Raulerson v. State, 420 So.2d 567 (Fla. 1982). Recently the Court of Appeals for the Eleventh Circuit recognized this to be the rule in Florida, citing Florida's Raulerson decision. Buford v. Dugger, 841 F.2d 1057 (11th Cir. 1988).

---

[1] Whether the state of Illinois has a legitimate state interest in a rule requiring ineffectiveness of counsel claims to be raised on direct appeal is another matter. For purposes of this brief Amicus will assume the the procedural requirement has a legitimate state interest.

Nevertheless, state prisoners in Florida, as in other jurisdictions -- and indeed, as in the instant case -- continue to raise these defaulted issues in post conviction state habeas proceedings. Often, in affirming denial of such post conviction motions, a state appellate court will render an ambiguous statement from which it is difficult, if not impossible, to determine whether the affirmance is based on the procedural waiver or a ruling on the merits of the federal question. The lower court in the instant case held that it cannot be presumed that such ambiiguous statements constitute a ruling on the merits. On the other hand, other circuits, such as the Court of Appeals for the Eleventh Circuit, construe such ambiguous statements as a ruling on the merits. See Mann v. Dugger, __ F.2d __ (1988) (Case No. 86-3182, decided April 21, 1988) footnote 4, where the court en banc said:

> "We find that the claim is not procedurally barred. Although petitioner failed to raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional infirmity in the trial." Mann v. State, 482 So.2d 1360, 1362 (Fla. 1986)(emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim.

See also Rosenfeld v. Dunham, 820 F.2d 52 (2nd Cir. 1987) at 55 where the simple statement "they do not merit" was considered a ruling on the merits.

Amicus submits that there are numerous reasons why, at least in post conviction proceedings, such ambiguous statements should not be construed as a ruling on the merits of the federal question.

First, Wainwright v. Sykes, 433 U.S. 72 (1977) is based on the premise that the state judgment of conviction is predicated, not on the federal question, but on an independent and adequate state ground; viz: the procedural default. In Florida, and, we presume, in most states, that judgment becomes final upon completion of the appellant process. McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987). In Griffith v. Kentucky, 479 U.S. 314 (1987) footnote 6, this Court also defined finality:

> "By 'final' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."

Where that judgment has become final, untainted by any erroneously decided federal question, due to the procedural default,

comity demands that it not be lightly overturned. When, a state prisoner in a post conviction proceeding collaterally attacks his final judgment of conviction he cannot possibly contend that that judgment rests on an erroneously decided federal issue. He simply cannot, because that issue was never decided in arriving at the finality of the judgment. It goes without saying that if in the collateral proceeding the state courts ignore the federal question and deny the collateral attack, without comment, the judgment continues to rest on an independent state ground and not on any erroneously decided federal question.

Even where, in a collateral attack on the judgment, a state court comments on, or even decides the federal question, it cannot be said that the final judgment of conviction no longer continues to rest on an independent and adequate state ground. It continues, we

submit, to rest on that state ground until such time as, through unambiguous language, the state court "waives the waiver" and decides the federal question in a manner that makes it unmistakeably clear that the final judgment of conviction no longer rests on the procedural default, but on the decided federal question.

Ambiguous language should not be construed as constituting a "waiver of the waiver" because it would do violence not only to finality, but to comity. Before deciding that a state court, in a post conviction proceeding ruled on the merits of a federal question, a federal court should be able to explain what was decided by the state court, that is, what did the state court say concerning the issue? Respect for federalism and the dual role of state and federal courts demands that a federal court not strain to find that a state court ruling is based on

the merits of a federal question simply because that court is hell bent on reaching that question.

Moreover, even where a state court, in a collateral proceeding tangentially decides the previously defaulted federal question, that should not, without more, give license to federal habeas intervention in the judgment of conviction. Federal intervention is warranted only where it is clear that the judgment of conviction itself no longer rests on the procedural default, but on the collaterally decided federal question. If, for instance, a state prisoner collaterally attacks his judgment of conviction on the grounds that his trial counsel had been ineffective for failing to raise a federal question, a state court might resolve the claim by ruling that under the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), the federal claim would have been

decided against the prisoner anyway. In deciding the federal question, tangentially to the ineffective claim, it cannot be said that the judgment of conviction no longer rests on the federal question. The judgment of conviction continues to rest on the procedural default. Only the collateral judgment rests on the federal question. In a subsequent habeas proceeding a federal court should have license to re-examine the tangentially decided federal question, but only as it applies to the ineffectivenss claim.

Second, County Court of Ulster County New York v. Allen, 442 U.S. 140 (1979) is distinguishable. In that case, the constitutional issue had been procedurally defaulted at the trial level. However, unlike the instant case, in Ulster County, it was raised on direct appeal of the judgment of conviction. Thus in Ulster, the judgment of conviction had not yet become final when the

state appellate court, ignoring the trial level procedural default, ruled on the merits of the issue. There is no disrespect for finality or comity in such a scenario because the judgment of conviction is not finalized without deciding the federal question.

Third. We recognize that there may be a sound policy reasons for allowing federal re-examination of a procedurally defauted question that has, nevertheless, been considered, discussed and ruled upon by a state appellate court on direct appeal. In the first place, the judgment of conviction is not yet "final" as that term has been defined by this Court in the retroactivity cases. Griffith v. Kentucky, 479 U.S. 314 (1987), see supra, for definition. However, as the retroactivity cases teach, once final, the judgment of conviction should not be lightly overturned by a newly decided federal question -- more so we submit, by a procedurally defaulted federal

question. In the second place, if the state appellate court, on direct appeal, erroneously decides the question, its decision will remain uncorrected by virtue of the trial level default and serve as precedent. We would emphasize, however, that where there is no discussion of the federal question by the state appellate court on direct appeal, its opinion serves no precedential value. Even if the state appellate opinion, contains some ambiguous language that is subject to being interpreted as a merits ruling, without discussion, it could serve no precedential value. This is especially true where the federal question is not raised on direct appeal but for the first time, in a collateral attack on that judgment.

Strained interpretations, of ambiguous state court rulings, by federal courts in order to reach federal questions is especially troubling in capital cases. Under the

"hydraulic pressure"[2] exerted by eleventh hour post conviction petitions, raising innumerable issues, state courts often reject questions that should have been raised at a prior stage through terse statements such as "the claim is without merit." Such a statement is as subject to the interpretation that the claim is without merit because it should have been raised at a prior stage as any other. When a federal court hastens to interpret such a statement as a ruling on the merits, tension in the federal system results.

Finally, this Court has consistently held that where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to the want of proper presentation in the state courts, unless the aggrieved party can

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[2] Evans v. Bennett, 440 U.S. 1301, 1307 (1979) Rehnquist, Chief Justice, then Justice as Circuit Justice.

affirmatively show the contrary. Street v. New York, 394 U.S. 576 (1969), Fuller v. Oregon, 417 U.S. 40 (1974), Exxon Corporation v. Eagerton, 426 U.S. 176 (1983), Webb v. Webb, 451 U.S. 493 (1981).

We recognize that in those cases, this Court was concerned with the jurisdictional prerequisits for certiorari jurisdiction; whereas, in the instant question the focus is on habeas consideration of procedurally defaulted issues. But, the analogy is strong. In the certiorari cases this Court has stated that the inquiry is whether the issue was presented to the state court in such a manner " . . . that it was necessarily decided . . ." Street at 581. No less should be required when a federal court, sitting in habeas, seeks to re-examine a procedurally defaulted federal question on the grounds that the state appellate court decided the issue.

CONCLUSION

This Court should clearly and unequivocally hold that a federal court sitting in habeas may not examine a procedurally defaulted federal question simply because it is raised in collateral proceedings in state court unless the state court's ruling makes it explicitly clear that the judgment of conviction no longer rests on the procedural default.

Respectfully submitted,

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